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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-45

GERALD A. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA, AND COMMISSIONER OF BANKING OF THE STATE OF FLORIDA, *Appellant*,

v.

BT INVESTMENT MANAGERS, INC., ET AL., *Appellees*.

On Appeal From the United States District Court for the Northern District of Florida

BRIEF IN SUPPORT OF APPELLANT OF FLORIDA BANKERS ASSOCIATION AS AMICUS CURIAE

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BRIEF IN SUPPORT OF APPELLANT OF FLORIDA BANKERS ASSOCIATION AS AMICUS CURIAE

This brief is filed under Rule 42(2) of the Rules of this Court, with consent of all parties to the case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Bankers Association has appeared as Amicus Curiae in this proceeding because its membership will be both directly and indirectly affected by

this Court's determinations. The Florida Bankers Association is the one organization in the State of Florida which represents principally all banking interests. As a part of its activities, the Association has long maintained an interest in the status of laws and regulations governing banking and financial institutions. The Association feels that because of both its status as representative of Florida banks and its experience and knowledge of the regulatory scheme governing Florida banking, it is in a position to provide assistance to the Court in considering the issues presented.

ARGUMENT

Introduction: The Historical Perspective

This is a case of first impression dealing with the most fundamental controls placed on the accumulation of economic power by bank holding companies under the banking laws of this country. The simply stated issue is whether the Commerce Clause of the United States Constitution prohibits the Florida Legislature from restricting bank holding companies from expanding across state lines into Florida by means of subsidiary investment advisory companies and trust companies. At stake in this case is the geographic extent to which bank holding companies are allowed to spin a web of financial subsidiaries capable of concentrating and exercising vast economic power within every community.

A brief historical review shows why such a fundamental issue is now being litigated. Since the founding of the nation, a great debate has existed between those favoring a centralized banking system in the nature of european models, and those favoring a decentralized system regulated principally by the several states. Not

infrequently, this great debate has made its way to the halls of the Court. For example, in *McCullough* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), the efforts of states to tax the nationally chartered banks out of existence was rebuffed.

After a century of experimentation, the Congress in 1927 reached one of the great compromises of American history. In order to preserve the major benefits of centralization without sacrificing the benefits of local controls over financial institutions, the Congress enacted the McFadden Act, 12 U.S.C. § 36. The purpose of the McFadden Act was to broaden the generally inferior powers of national banks as compared to state banks, while guaranteeing competitive equality within the uniquely American dual system of banking. It did so in major part by permitting national banks to branch, but only to the extent state law permitted state banks to do so. Moreover, interstate branching was prohibited, as the grant of the power to branch contained in 12 U.S.C. § 36(c) was limited to the states wherein the national bank was "situated". The legislative history of the McFadden Act is recounted in the opinion of the Court in *First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966). The limitations on branching contained in the laws of most states, and made applicable to national banks through the McFadden Act, led to a phenomenal growth in bank holding companies. By creating a corporation to own multiple banks, it was possible to avoid branching limitations. See generally, Savage, *A History of the Bank Holding Company Movement: 1900-1978,* in Staff of the Board of Governors, Federal Reserve System, The Bank Holding Company Movement to 1978: A Compendium § 2, at 6 (Apr.12,1978). Congressional fears

regarding the ability of holding companies to evade regulation and to accumulate vast economic power through combining control of banks with control of non-bank commercial enterprises resulted in the enactment of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 et seq. See *Alabama Ass'n of Ins. Agents* v. *Board of Governors,* 533 F. 2d 224, 231 (5th Cir. 1976); Wallach, *Section 4(c)(6) of the Bank Holding Company Act: Chink in the Armor,* 94 Banking L. J. 525 (1977). To achieve its purpose, Congress required holding companies to obtain approval of the Board of Governors for acquisitions, and prohibited holding companies from engaging in non-banking business directly or through subsidiaries. The only relevant exception was that a holding company could own a company whose business was of a "financial fiduciary or insurance nature" and "so closely related to the business of banking as to be a proper incident thereto." The Act further prohibited expansion of a bank holding company beyond the boundaries of the state in which it maintained its principal place of business or conducted its principal operations.

These organic and geographic restraints on the accumulation of power by bank holding companies were recognized, moreover, to be only minimum restraints. The important interest of the individual states in retaining their control over financial institutions operating within their borders persuaded Congress that it was essential to preserve state powers within the dual system of regulation. Thus, 12 U.S.C. § 1846 provides:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

Pursuant to this reservation of sovereign powers, states have acted to regulate bank holding companies more stringently than federal law, including prohibition of bank holding companies from doing business. *Opinion of the Justices,* 151 A. 2d 236 (N.H. 1959); *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed* 359 U.S. 311 (1959); *Delaware & Hudson Co.* v. *Boston Railroad Holding Co.,* 81 N.E. 2d 553 (Mass. 1948).

In 1966, Congress further limited the opportunities for geographic expansion of bank holding companies by amending § 1842 to eliminate the option of expanding either within the state in which the principal office was maintained, or the state in which principal operations were conducted. Act of July 1, 1966, § 7(d), 80 Stat. 236, 238. With passage of the 1966 Amendments, a bank holding company was limited to expanding within the boundaries of the state wherein the greater share of its deposits was sited as of July 1, 1966, or upon becoming a holding company. Moreover, the power of the states was strengthened. Without the optional choice existing previously, there could be no interstate expansion unless the state into which the holding company desired entry expressly authorized such entry by statute "and not merely by implication".

Although the Holding Company Act expressly referred only to interstate acquisition of banking subsidiaries, the effect was to bar substantially all interstate acquisitions. In order for a non-bank to be "closely related to the business of banking", and thus subject to being acquired, its activities had to be di-

rectly and significantly connected to the existing banking operations of the holding company. See *National Courier Ass'n* v. *Board of Governors,* 516 F. 2d 1229, 1235-37 (D.C. Cir. 1975). Thus, the interstate expansion prohibition, commonly known as the Douglas Amendment, effectively prohibited interstate acquisition of both banks and non-banks.

In 1970, the Act was amended to bring bank holding companies owning a single bank within the limitations of the Act, and § 1843(c)(8) was amended to specifically state criteria which a holding company's acquisition of a company had to meet to gain approval of the Board of Governors, in addition to being "so closely related to banking or managing or controlling banks as to be a proper incident thereto". As the District of Columbia Circuit Court of Appeals explained in *Investment Company Institute* v. *Board of Governors,* —— F.2d ——, Case No. 77-1862 (D.C. Cir. Opinion of March 30, 1979), the "closely related" language of § 1843(c)(8) was amended in 1970 to substitute the phrase "closely related to banking" for the phrase "closely related to the business of banking". The purpose of this minor language change was simply to allow bank holding companies to acquire subsidiaries doing types of business generally engaged in by banks without requiring that the existing subsidiaries already be engaged in the particular activity. Although nothing in the legislative history suggests a congressional desire to allow interstate ownership of subsidiaries, holding companies were for the first time able to seize upon an arguable gap in the Congressional prohibition of interstate ownership.

Bankers Trust New York Corporation attempted to take advantage of this arguable gap by forming a subsidiary, BT Investment Managers, Inc., to get approval of the Board of Governors for expansion across state boundaries. Acting pursuant to 12 U.S.C. § 1846, which reserves to the several states their full sovereign powers with respect to "banks, bank holding companies, *and subsidiaries thereof",* the Florida Legislature enacted § 659.141(1), Florida Statutes, to halt the evasion of the historical policy of limiting the concentration of economic power in holding companies and restricting interstate expansion as expressed in the McFadden Act and the Douglas Amendment to the Bank Holding Company Act, and to uphold the like public policy of the State of Florida.

I.

The Negative Implications Of The Commerce Clause Do Not Invalidate State Regulation Of The Ownership Of Financial Institutions Consistent With Congressional Policy And Limited To Intrastate Economic Activity.

In declaring § 659.141(1), Florida Statutes, unconstitutional under the Commerce Clause, the district court ruled that the statute was *per se* unconstitutional as raising a protectionist barrier to commerce. The district court based its decision on the decision of the Court in *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). It is submitted, however, that the district court misread that decision.

The *Philadelphia* decision is one of a long series of decisions holding that the states can not erect barriers to the interstate flow of commerce. The real issue in the case was whether garbage was an item of commerce. Quite clearly, if it was an item of commerce, free movement across state lines could not be wholly barred to advance a parochial interest. The district court erred

by interpreting the *Philadelphia* decision to mean that practically any effect on interstate commerce condemns a state law, rather than viewing the decision as an application of the meaning of the term "commerce" to a particular article which had been wholly barred from crossing the state boundary.

The district court's error arises from the failure to give proper weight to the decision in *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). In that case the Court was concerned with a Maryland statute prohibiting refiners and producers of petroleum products from owning outlets for the retail sale of such products. Although the regulation affected only out-of-state interstate companies, the Court upheld the statute under the Commerce Clause because it did not discriminate against interstate commerce, but only as to certain interstate firms. The decision recognized that under the Commerce Clause the relevant concern is not the wisdom of a state's laws, but the constitutional concern for borders open to the flow of commerce.

The present case is closely analogous to *Exxon.* Section 659.141, Florida Statutes, does not discriminate against an interstate flow of commerce. It is not at all concerned with closing the borders of Florida to financial services provided by firms in other states. Banks, bank holding companies and trust companies are free under the statute to engage in any activity they may desire on an interstate basis, including the provision of investment advisory services. The use of telephone and other electronic communication is unaffected. The use of the mail is untouched. Travel into Florida is of no statutory concern. The prohibition of the statute is aimed solely at particular types of business entities

owning or controlling banks, trust companies and investment advisory companies having offices in Florida and doing an intrastate business.

The legislative intent to regulate only intrastate activity permeates the statute. The statutory prohibition is of ownership or control of

> "Any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or . . . any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state."

The acquisition of stock in banks, trust companies or investment advisory businesses is not entirely prohibited. Only controlling interests are prohibited. Moreover, the statute expressly exempts situations which might arise in the course of doing business interstate. Stock in the regulated types of enterprises can be generally acquired in a fiduciary capacity, or in connection with the underwriting of an issuance of securities, or in connection with the collection of a debt. Interstate transactions are not the concern of the statute.

By limiting the application of § 659.141 to ownership or control of companies with intrastate offices, exempting ownership of stock arising out of normally occurring business transactions, and exempting activities of an interstate nature, the Florida Legislature has acted in a manner fully consistent with the Commerce Clause of the United States Constitution. See *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.,* 366 U.S. 276 (1961). The principle that a corporation of one state may enter into all other states of the union for purposes of interstate commerce is in no manner abridged. Section 659.141

is aimed solely at the ownership of an intrastate office from which intrastate activities are undertaken. Compare *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978), with *Dahnke-Walker Mill Co.* v. *Bondurant,* 257 U.S. 282 (1921), and *York Manufacturing Co.* v. *Colley,* 247 U.S. 21 (1918).

In regard to § 659.141, only one factor exists in the present case different from the circumstances on which *Exxon* was decided. The Florida statute prohibits the acquisition of control over the regulated enterprises by banks, trust companies and bank holding companies whose operations are principally conducted outside of Florida. In *Exxon,* there were no intrastate producers or refiners of petroleum products. This difference is not of significance in the application of Commerce Clause principles, however.

The statute does not prohibit control of the regulated enterprises from outside of Florida. Any person, natural or corporate, can own or control the regulated enterprises without regard to state of residence, except the three types of corporate entities to which the statute is directed. Moreover, Florida banks, trust companies and bank holding companies are not exempt from the statute. All such Florida institutions whose operations are conducted principally outside of Florida are barred from controlling or acquiring any of the regulated enterprises. The "grandfather" provisions of the statute, § 659.141(3) (d)-(h), also apply equally to Florida and non-Florida institutions. The statute is evenhanded in its sanctions.

As in *Exxon,* no market is cordoned off and no one is insulated from competition. The goal of the statute is not an impermissible one. To the contrary, the statute seeks to supplement the congressionally declared national policy against interstate bank branching and concentration of economic power. The distinction drawn by § 659.141 is the same as that which Congress has drawn in 12 U.S.C. § 1842(d), and promotes the very policies motivating the McFadden Act and the Douglas Amendment to the Bank Holding Company Act. Expression by Florida of a limitation on the entry of out-of-state bank holding companies is not a matter of regional insularity or the protection of local vested economic interests. A transcending concern of regulation of financial institutions has been to avoid concentration of economic influence and its anti-competitive effects by any limited group.

The risk of undue concentration is perhaps best exemplified by what has occurred as a result of the district court declaring § 659.141 unconstitutional. A number of institutions from the money centers have made application to open trust companies in Florida. The list includes Continental Illinois Corporation, Bankers Trust New York Corporation, Manufacturers Hanover Corporation, U.S. Trust Corporation, Detroitbank Corporation, Morgan Holdings Corporation, a subsidiary of J. P. Morgan & Company, and Harris Bankcorp, Inc. As of 1977 these institutions had trust assets under management of approximately $100 billion. FDIC, OCC and Bd. of Gov. Fed. Res., *1977 Trust Assets of Insured Commercial Banks,* Table 7 (1978). In comparison, the total trust assets under management in Florida is approximately $9 billion. Nearly every applicant has trust assets under administration exceeding the total for all of Florida. The strong interest of the states in the healthy development of financial institutions is unquestionably challenged by such

a vast influx of economic power. It is for this reason that Congress has time and time again given recognition to the importance of geographical restraints on expansion to prevent concentration of power nationally and in the states.

By restricting ownership ties of the regulated enterprises, the Florida statute responds to the impact on Florida's citizens posed by control of financial institutions by entities headquartered beyond the reach of Florida's enforcement and regulatory powers. The undesirability of control of local financial institutions by far-flung conglomerate entities is a proper and legitimate subject of state concern, historically recognized by Congress and the judiciary. See, e.g., *Iowa Independent Bankers* v. *Board of Governors,* 511 F. 2d 1288 (D.C. Cir. 1975), *cert. denied* 423 U.S. 875 (1975); *American Trust Company, Inc.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. 313 (D. S.C. 1974). The basis for this concern is substantial. Financial holding companies are fertile ground for facilitating monopolization through anti-competitive activities. The opportunities for tying arrangements, reciprocal dealings, biased inter-company transactions and self-dealing are manifest. See *Bank Holding Company Act Amendments: Hearings on H.R. 6778 Before the House Comm. on Banking and Currency,* pts. 1-2, 91st Cong., 1st Sess. (1969); *Control of Bank Holding Companies: Hearings on S. 880, S. 2350, and H.R. 6227 Before the Subcomm. on Banking of the Senate Comm. on Banking and Currency,* 84th Cong., 1st Sess. 64-66 (1955); Nosker, *A Supervisor Looks At Recent Banking Developments, Problems, And Prospects,* 94 Banking L.J. 18 (1977). These risks to the public welfare aggravated when geographic dispersal beyond jurisdictional powers renders effective regulation virtually impossible. The same risks are far more amenable to regulation, and abuses far more likely to be discovered, when the bank, trust company or investment advisory business is an independent entity or owned by institutions whose operations are principally conducted within the jurisdiction of a single state regulatory authority.

The district court did not fully grasp the importance of these considerations, as it misconceived the congressional intent behind the 1970 Amendments to the Bank Holding Company Act. As the District of Columbia Circuit Court of Appeals has noted in *Investment Company Institute* v. *Board of Governors,* —— F.2d ——, Case No. 77-1862. (D.C. Cir. March 30, 1979), a deep congressional concern in the enactment of the 1970 Amendments to the Bank Holding Company Act was to prevent the structuring of the American economy in a manner similar to the *Zaibatsu* system of Japan, where multiple types of economic activity are concentrated in a few conglomerates wielding vast power. See *Bank Holding Company Act Amendments—Hearings on H.R. 6778 Before the House Comm. on Banking and Currency,* 91st Cong., 1st Sess. at 13 (1969); *One Bank Holding Company Legislation of 1970: Hearings on S. 1052, S. 1211, S. 1664, S. 3823, and H.R. 6778 Before the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. at 9, 21 (1970).

Congress by no means intended to encourage the creation of financial conglomerates. Instead, Congress curtailed the ability of one-bank holding companies to control non-bank subsidiaries by bringing them within the Act, and made a minor alteration in the extent

to which bank holding companies could enter into traditional areas of banking activity new to the particular institution, but not to the industry. The lack of any indication of a congressional intent to establish a policy in favor of branching across state lines by financial institutions is significant. The long history of Congress' policy of allowing the several states to control the extent to which interstate branching could occur is hardly likely to have been altered without considerable debate. Indeed, as recently as 1978, Congress reaffirmed the principles of the McFadden Act and the Douglas Amendment when it incorporated the substance of those laws into the International Banking Act of 1978. See 12 U.S.C. §§ 3102(a), 3102(h), 3103, 3107.

On the other hand, there was no need for Congress to specifically address in 1970 the extent of the power of the states to prohibit holding company control of subsidiaries across state lines. It had done so previously in 1956 by bowing to state regulation of control of banks across state lines, and by reserving to the states full power and jurisdiction "with respect to banks, bank holding companies, *and subsidiaries thereof.*" (Emphasis Supplied.) See Jessee & Selig, *Bank Holding Companies And The Public Interest,* at 140 (1977); *Iowa Independent Bankers* v. *Board of Governors,* 511 F. 2d 1288, 1297 (D.C. Cir.), *cert. denied* 423 U.S. 875 (1975); *Commercial National Bank* v. *Board of Governors,* 451 F. 2d 86, 89 (8th Cir. 1971); *American Trust Co.* v. *South Carolina State Board of Bank Control,* 381 F. Supp. 313, 320 (D. S.C. 1974).

The regulation of control over corporations has traditionally been a matter of state concern. See *Louis K. Liggett Co.* v. *Lee,* 288 U.S. 517, 556-561 (1933) (Brandeis, J. dissenting). In the absence of contrary federal law, state regulation of corporate ownership has been upheld under the commerce clause. See *Louisville & Nashville R.R.* v. *Kentucky,* 161 U.S. 677 (1896). Moreover, banks, trust companies and investment advisory businesses are affected by the public interest to such an extent that they constitute an area of traditional state concern. See *Noble State Bank* v. *Haskell,* 219 U.S. 104, 113 (1911); 1 A. Scott, The Law of Trusts § 1.11, (3d ed. 1967); 4 L. Loss, Securities Regulation 2219 (1969); *Marketlines, Inc. . Chamberlain,* 63 Ill. App. 2d 274, 211 N.E. 2d 399, 402 (1965). Considering the express language of Congress in the context of the history of the dual system of banking and traditional concepts of the regulatory powers of the states, it is clear that the congressional intent in making an express reservation of state power in the Holding Company Act of 1956 was to avoid any question that Congress intended to pre-empt an area of traditional state concern, and to authorize full regulatory controls by the states.

Given the negligible affect of § 659.141 on interstate commerce, the substantial interest of Florida in the area regulated and the express authorization of state regulation by Congress, the district court should not have held the statute *per se* invalid under the commerce clause, but should have upheld it under the teachings of *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970); and *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946).

II.

The Negative Implications Of The Commerce Clause Do Not Invalidate State Laws Requiring State Chartering Of Trust Companies Doing Business Within A State.

In declaring § 660.10, Florida Statutes unconstitutional, the district court mistook the nature of the statute. Section 660.10 does not prohibit anyone from doing a trust business in Florida. It only requires that the trust business be done through a trust company chartered in the regulatory process established by law. It constitutes simply a regulatory technique for assuring that the trust business is conducted in a proper manner. It has no significant effect on interstate commerce.

Trust companies organized under the laws of other states may enter into transactions in Florida consistent with duties resulting from such a trust company becoming the executor or administrator of an estate; or trustee under a will, charitable foundation or endowment; or similar trust. The powers of such foreign trust companies to engage in limited transactions in Florida are detailed throughout the various provisos to the statute. Foreign trust companies may contract within Florida in regard to loans, security instruments, and acquisition or conveyance or management of property in relation to loans or obligations. They may service Florida customers directly, or indirectly by contract with other persons, and are allowed full access to the courts of the state to enforce obligations. The statutory prohibition is aimed solely at intrastate activity. Foreign trust companies can not be the executor or administrator of a decedent's estate, except as set forth in the Uniform Probate Code, Chapter 734, Florida Statutes, for ancillary administration. Otherwise the restrictions on foreign trust company activity is limited

to serving within Florida as a testamentary trustee, a court appointed receiver or guardian, and holding real property in trust. However, it is expressly permissible for a foreign trust company to be bequeathed property, including real property, by a testator, with the laws of the trust company's principal place of business governing its duties as trustee. § 660.10(3), Florida Statutes.

The statute applies equally to all persons, creates no competitive advantages and erects no barriers to commerce. The statute is concerned solely with the sensitive area of protection of decedents estates, fiduciary relationships and the devise of real property. These are matters peculiarly of state concern and have been so recognized by this Court. *United States* v. *Fox*, 94 U.S. 315 (1877). Indeed, like statutes exist in at least fourteen other states and have been common place in the law of trusts. See *Appendix, Brief In Support Of The Jurisdictional Statement For The Conference Of State Bank Supervisors As Amicus Curiae*, at 21; 1 A. Scott, The Law of Trusts § 96.6 (2d Ed. 1956); Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator, or Testamentary Trustee*, 26 A.L.R. 3d 1019 (1969).

Florida's statute serves only one purpose, and that is to require that the trust business be conducted by all under a specially tailored regulatory process, with the only exception being that national banks duly authorized to exercise trust powers by federal regulators are permitted pursuant to the doctrine of competitive equality. See *American Trust Co.* v. *South Carolina State Board of Bank Control*, 381 F. Supp. 313 (D.S.C. 1974). It is in effect a licensing requirement for doing business intrastate. As such, the statute is an exercise of the sovereign power of a state to exclude a foreign

corporation from its boundaries solely because it is a foreign corporation. See *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562 (1949); *Asbury Hospital* v. *Cass County,* 326 U.S. 207 (1945); *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1869) *as modified, United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). The only limitations upon this power is the erection of actual barriers to the flow of commerce interstate and the ouster of federal instrumentalities. *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania,* 125 U.S. 181 (1888). When the effect of a statute barring foreign corporations is limited to operation of offices within the host state, and does not bar commercial intercourse, the power of a state to exclude is wholly discretionary. *Id.* See also, *Atlantic Refining Co.* v. *Virginia,* 302 U.S. 22 (1937); *Hemphill* v. *Orloff,* 277 U.S. 537 (1928); *Diamond Glue Co.* v. *United States Glue Co.,* 187 U.S. 611 (1903); *Bank of Augusta* v. *Earle,* 38 U.S. (13 Pet.) 519 (1839).

The only basis for § 660.10 being questioned in this proceeding is the extent to which § 659.141 interacts with it to bar bank holding companies whose operations are conducted principally outside of Florida from forming a Florida trust company. As discussed in Point I of this brief, such a bar does not violate the Commerce Clause. The primary error of the district court's reasoning was to miscomprehend the nature of the principles set forth in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970), and *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Rather than examining the marketplace and the flow of commerce across state lines, it looked solely to the effects of § 660.10 upon certain marketers. The district court viewed any effect upon interstate commerce sufficient to allow federal regulation to be sufficient to condemn state laws drawing any

lines between domestic and foreign corporations. It considered legitimate state interests "irrelevant" because such distinctions were drawn. 461 F. Supp. at 1197.

There is nothing in the record suggesting that § 660.10 has been applied by state regulatory authorities in a manner discriminating against interstate commerce, not even an allegation. The sole basis for the statute being condemned is that it requires foreign trust companies to form a Florida trust company to do business in Florida. The district court's reasoning grants a constitutional right to corporations to establish offices without regard to state boundaries, placing in question even the power of the states to require foreign corporations to qualify with state authorities before doing business within a state. The district court has forced Florida to recognize a special privilege of engaging in business in the corporate form granted by another state, despite innumerable rulings of this Court that the states are not constitutionally obligated to do so. *E.g., Wheeling Steel Corp.* v. *Glander, supra; Asbury Hospital* v. *Cass County, s pra; Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania, supra.* Also not considered is the need to interpret the Commerce Clause in a manner consistent with the Privileges and Immunities Clause. As this Court has noted, these two provisions of the Constitution have a common source. *Baldwin* v. *Montana Fish And Game Comm'n,* 436 U.S. 371, 379-381 (1978). While these two provisions have different subject matters, the goal is the same. There can hardly be a sovereign state right under the Privileges and Immunities Clause to disregard the special privilege granted by another state to do business in the corporate form, and a lack of state power under the Commerce Clause to make the distinc-

tion. The power either exists or it does not. This Court has consistently viewed the states as having the sovereign power to distinguish between domestic and foreign corporations, interpreting the Commerce Clause to limit that power only to the extent that commercial intercourse across state lines is unduly burdened. *Diamond Glue Co.* v. *United States Glue Co., supra; Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania, supra;* cf., *Lincoln National Life Ins. Co.* v. *Read,* 325 U.S. 673 (1945). The district court should have done the same.

Since § 660.10 does not discriminate against interstate commerce, does not favor Florida citizens over others, does not create a protected market and otherwise has no effect on interstate commerce, but is merely the exercise of the sovereign power to exclude foreign corporations from doing an intrastate business without proceeding through the regulatory process applied to all persons, it is a valid law.

CONCLUSION

For the reasons stated above, the decision of the District Court for the Northern District of Florida should be reversed.

Respectfully submitted,

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